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COMMENTS OF THE TOBACCO INSTITUTE ON
THE FTC STAFF REPORT ON THE CIGARETTE
ADVERTISING INVESTIGATION

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SUMMARY AND CONCLUSIONS

The FTC Staff Report on the Cigarette Advertising Investigation ("Report") culminates a supposedly comprehensive five-year investigation of the purpose and effect of cigarette advertising. Yet despite over 300 pages of text, with numerous footnotes and appendices, the Report does nothing more than confirm what has been apparent for over two decades: the FTC Staff does not approve of cigarette smoking and will find cigarette advertising objectionable as long as anyone continues to smoke.

The essence of the Report is the claim that, despite the Surgeon General's health warning (which has appeared on every cigarette package since 1970 and in every cigarette advertisement since 1972), cigarette advertising is deceptive and misleading because it does not adequately inform consumers about all of the health hazards that the FTC Staff has attributed to smoking. The warning is ineffective, the Staff claims, because substantial numbers of consumers remain "unaware" of arcane details of the smoking and health controversy. The Report utterly fails, however, to support these conclusions. The premises on which they are based are faulty, and the evidence marshalled in support of those premises is either inaccurate or inaccurately interpreted.

The Tobacco Institute submits these Comments on behalf of the major manufacturers of cigarettes to point out

the most important deficiencies of the Report. Supporting materials for each of the points summarized below are included in the tabbed sections of this submission. The comprehensiveness of the additional materials, however, is dictated not by the merits of the Report but rather by its length and the obvious importance that the Staff places upon it. It should be clear to any fair-minded reader that although the Report purports to analyze consumer awareness of smoking and health issues, the Staff's primary concern is with consumer behavior. The real message of the Report is that the cigarette warning is ineffective not because too few people are aware of the warning but because despite the warning more people continue to smoke than the Staff deems desirable. That message, which continues a long tradition of FTC Staff hostility to the tobacco industry, represents an inappropriate and now thoroughly discredited regulatory attitude.

1. The Staff's Analysis of Consumer Awareness of the Alleged Health Hazards of Smoking (Chaps. III and IV(II)) Is Fundamentally Defective.

The central thesis of the Report is the Staff's insistence that the current warning required in cigarette advertisements is ineffective because it does not adequately inform consumers of "new findings" about the relationship between cigarette smoking and health. The Staff attempts to demonstrate this thesis by reviewing various consumer surveys and studies that, according to the Staff, reveal that consumers lack knowledge of the specific forms and severity of

the health problems that the Staff attributes to cigarette smoking.

The Staff's assertions depend entirely, of course, on the premise that its statement of the health hazards of smoking is established fact. As we explain below, that premise is wholly untenable. Moreover, the Report discusses the warning notice as though it was the only available means of communicating with members of the public about the asserted health hazards of cigarette smoking. In fact, discussion of the specifics of the smoking and health controversy frequently appears in the print and electronic media and repeatedly is stimulated by a variety of groups, both governmental and private. But aside from these problems, the Report's conclusions about consumer awareness are flawed in at least two critical respects.

The Staff has made no effort to determine whether the present extraordinarily high level of consumer awareness of the smoking and health controversy could possibly be increased. Although the Staff admits that "most people are generally aware that smoking is hazardous," Report at 3-5, that admission is, to say the least, an understatement. The fact is that more people are aware that "the Surgeon General has determined that cigarette smoking is dangerous to your health" than virtually any other fact. This point is amply illustrated

by the very studies cited and relied upon in the Report.¹ Nonetheless, the Staff asserts repeatedly that significant numbers of people are "uninformed" about these matters. Report at 17. But one searches the Report in vain for a recommended standard against which the current levels of consumer awareness might be judged. Without such a standard, the Report's assertions concerning the effectiveness of the current warning or the advisability of the new warnings proposed in the Report are meaningless.

The unstated and assumed standard of comparison reflected in the Report is one of "perfect knowledge." The Report contains a 57-page discussion of the diseases and other health problems that have been linked to smoking by various researchers and that have been described in various Surgeon General reports over the years. The Report then assumes that 100 percent of the public should have complete awareness of the information in these Surgeon General reports, and to the extent that the public is not aware of such details, the cigarette warning has been a failure.

The absurdity of this assumption is apparent on its face. Certainly the Surgeon General does not subscribe to it. In both the 1978 and 1979 Reports on Smoking and Health, the Surgeon General emphasized the "notable changes" not only in public awareness but in public behavior, and expressed doubt

¹ These studies and the Staff's misuse of the statistics they present are discussed in detail in Tab I to these Comments.

that a higher level of awareness could either be obtained or have any effect on smoking behavior. 1979 Report at 17-8, 9; 1978 Report at 19-9.

To suggest that further increases in awareness can be accomplished by any means is fanciful; to suggest, as the Staff does, that it can and should be accomplished by means of a warning notice in cigarette advertisements is ludicrous.

The Staff confuses the question of what consumers believe about smoking and health with what consumers are aware of about the subject. This confusion, whether deliberate or not, is the inevitable result of the Staff's premise that the causal relationship between smoking and a variety of health problems has been demonstrated as indisputable fact. Anyone who does not know and is unable to repeat such "facts" is deemed to be unaware of the asserted health hazards of smoking. But since the premise itself is subject to serious question, people who respond with answers other than those that the Report or the studies deem to be correct might well be aware of the claims made about smoking but simply not believe them. Indeed, the studies cited by the Staff demonstrate this to be the case.

None of the studies discussed in the Report made any serious effort to examine awareness as opposed to beliefs, yet the Staff consistently misuses the findings of these studies to support its conclusions about consumer awareness. One example should suffice:

"According to the Gallup Opinion Index, June, 1978, 19% of the population do not believe that smoking causes lung cancer Among all smokers, 28% did not believe smoking caused lung cancer while among heavier smokers, nearly one-third -- 31% -- did not believe or know about the link. Projected nationwide, these data suggest that tens of millions of Americans, both smokers and non-smokers, do not know that cigarette smoking causes lung cancer." Report at 3-19. (Emphasis supplied).

Manifestly, the conclusion -- that people do not know that cigarette smoking causes lung cancer -- is unsupported by and has nothing to do with the stated premise -- that many people do not believe that smoking has such effects.

There is accordingly no basis upon which to justify the proposals set forth in the Report. A person's beliefs about a controversial issue are not equivalent to a person's awareness of that issue. The Staff's failure to observe this fundamental distinction eliminates any basis for its assertions that the current cigarette warning is ineffective or that a substantial number of people are unaware of the asserted health consequences of cigarette smoking. With that prop gone, the rest of the elaborate house of cards built by the Staff collapses.

2. The "New Facts" That the Staff Claims Have Been Discovered About the Health Hazards of Smoking (Chap. I) Are Neither New Nor Facts.

The Staff's "summary" of the evidence on smoking and health makes it clear that any evidence contrary to the Staff's preconceived notions on the issue has been rejected. The

Report simply parrots several one-sided reports of the Surgeon General and ignores many gaps in knowledge that exist about smoking and health. The Staff review even omits certain significant concessions made by the Surgeon General in those reports.

It is a fact that no evidence reviewed in the first Surgeon General's Report in 1964 and no evidence developed since that time has established that smoking is a cause of any disease, and the Staff's claim to the contrary is simply wrong. The studies and evidence may now take up more space, but they do not prove or demonstrate anything more than was proved or demonstrated in 1964. No research has proved or disproved a causal relationship between smoking and any disease. None has accounted for the numerous other factors related to the inception and course of such chronic degenerative diseases.

The Staff, however, uncritically accepts statistical associations as proving cause and effect. The Staff does not mention the significant fact that no one has been able to produce squamous cell lung cancer in animals by inhalation of tobacco smoke. It does not consider the fact that the decline in heart disease deaths in the United States confounds the claim that smoking is a principal cause of heart disease. It overlooks the possible effect of an increasingly stressful environment on the general health of women and changes in female smoking patterns. Indeed, it omits or ignores everything

that runs counter to the long-standing official FTC position on smoking and health.¹

The highly partisan and selective nature of the Staff's "summary" of the evidence on smoking and health is most apparent in the Report's attack on certain positions set forth in a 1979 review of the smoking and health controversy by The Tobacco Institute, which presented the conclusions and findings of a number of eminent scientists with whose views the Staff obviously disagrees.² A comparison of the 1979 Tobacco Institute review with the Staff "summary" readily demonstrates that (1) there are many controversial scientific questions about smoking and health; (2) the Report has not accurately summarized the scientific evidence; and (3) there is much available evidence that was not considered by the Staff or, if considered, was rejected out of hand.

In short, it is the Staff's biased position -- and not scientific fact -- on which the Staff has chosen to base its examination of consumer awareness of the smoking and health controversy. Since many experts do not "know" that smoking causes or contributes to the various diseases attributed to it in the Report, it is baseless for the Staff to

¹ See Tab II to these Comments for a further discussion of the Staff's treatment of the evidence concerning smoking and health.

² A copy of The Tobacco Institute review, Smoking and Health 1964-1979; The Continuing Controversy (1979), is attached as an Appendix to these comments.

claim that the cigarette warning is ineffective because some consumers do not "know" -- or, more accurately, do not believe -- all of the health hazards that the FTC Staff claims are associated with smoking.

3. The Staff's Discussion of Cigarette Advertising (Chap. II) Misstates the Purpose and Effect of Such Advertising.

The Report merely repeats longstanding Staff opposition to all cigarette advertising. Despite the fact that the Report supposedly culminates a five-year investigation of the subject, the Staff has found absolutely nothing to say in 1981 about cigarette advertising that was not said in virtually identical fashion in 1970 and before. Indeed, the Staff states that "there has been little change in the character of cigarette advertising" since 1964 (Report at 2-8), and then proceeds to attack recent advertising in terms identical to those used in virtually every annual FTC report issued since 1964. The Report's criticism of "rich, thematic imagery," association with individuals "worthy of emulation," and all the rest could have been -- and probably was -- lifted word-for-word from previous FTC cigarette reports.¹

Cigarette advertising is designed to attract smokers to a particular brand of cigarette, not to convince nonsmokers to take up smoking. The Staff's brief and superficial discussion of cigarette advertising proceeds on the unsupported

¹ See Tab III for additional discussion of the Staff's views on cigarette advertising.

assumption that such advertising is designed to persuade nonsmokers to smoke. It is clear to nearly everyone other than the Staff, however, that cigarette advertising is not aimed at influencing nonsmokers, but rather is directed toward the far more limited (and realistic) objective of influencing smokers' brand selection in a highly competitive market. As stated in the 1979 Surgeon General's Report:

"As the cigarette industry has asserted the major action of cigarette advertising now seems to be to shift brand preferences, to alter market shares for a particular brand."
1979 Report at p. 18-23.

Although the Staff relies heavily on the 1979 Surgeon General's Report in support of its health claims, it ignores statements such as the one above, which contradict the Staff's preconceived ideas about cigarette advertising.

Cigarette advertising has been shaped by circumstances. Following removal of cigarette advertising from the broadcast media and its resulting confinement to the less effective print and outdoor media, the industry made compensatory increases in advertising expenditures in those media to offset the loss of radio and TV exposure. At the same time, cigarettes were changing, and brands were proliferating in an unprecedented manner. The cigarette market is in the midst of experiencing, and adapting to, a major shift in consumer preference in favor of lower "tar" cigarettes, and every cigarette manufacturer, to remain competitive, must be represented in that expanding segment of the market. Low "tar" brands

accounted for more than 40 percent of all cigarette sales in 1980, compared to 2 percent just six years earlier. Today there are more than 180 different brands or brand variations competing for market shares. This is a market development that the FTC itself has long sought.

The intense inter-brand competition that this fundamental market change has created is probably unparalleled in any other industry, and is reflected in the very small slices of market share by which success is measured in the industry. A new brand need capture only one-half to one percent of the market to achieve commercial success.

As a practical matter, therefore, it is evident that a cigarette advertiser need achieve only a very limited objective, switching the brand preference of a small portion of existing smokers, in order to enjoy notable commercial success. No rational cigarette advertiser would abandon that realistic, limited objective in favor of a quixotic crusade to convert nonsmokers.

Cigarette advertising does not cause nonsmokers to take up smoking. There is no known evidence -- certainly the Staff has cited none -- that advertising is an important influence in causing people to start smoking. To the contrary, in recent years the cigarette sales curve has been relatively flat. Government sources estimate that there are 20 to 30 million fewer smokers in the country today than there would have been had the pre-1964 trend not been reversed by the

smoking-and-health controversy. A 1981 Gallup Poll survey reported that the percentage of the population that smokes is the lowest recorded in 37 years, a downward trend matched by an upward trend in the proportion of the public who believe that smoking is a cause of various health problems. There is no support in such facts for the Staff's theories about the purpose and effect of cigarette advertising.

4. The Staff's Legal Discussion (Chap. IV)
Is Erroneous.

In claiming that the FTC has the legal authority to take the steps against cigarette advertising recommended in the Report, the Staff misstates and misapplies the law applicable to false and deceptive advertising and disregards previous actions by Congress and the Commission itself that preclude imposition of the "remedies" advocated in the Report. Moreover, the Staff's proposed "remedies" would violate the First Amendment protection for commercial speech.¹

There is no legal support for the Staff's proposition that cigarette advertisements are deceptive because consumers may be uninformed about details of the smoking and health controversy. The Staff argument that cigarette advertising is deceptive within the meaning of Section 5 of the FTC Act is based on the premises that consumers are uninformed (rather than misinformed) about the alleged health hazards of smoking

¹ See Tab IV for a complete analysis of the Staff's discussion of the legal support for its proposals.

and that cigarette manufacturers have a legal duty to inform consumers about those allegations. As we demonstrate in these Comments, however, consumers clearly are informed and aware of the details of the smoking and health controversy. Moreover, all of the cases arising under Section 5, including those relied upon by the Staff, hold that deception occurs only when consumers are misinformed about the effects of the product advertised. Such cases manifestly are not applicable to cigarette advertising. Every cigarette advertisement carries an affirmative health warning, unlike advertisements for other consumer products such as meat, eggs, alcoholic beverages, hair dryers, and cosmetics that also have been linked by various government agencies to various health hazards. In view of this affirmative disclosure, which sets forth the essence of the government position on the smoking and health controversy, there is no legal basis for compelling cigarette manufacturers to disclose even greater detail about the FTC Staff's views on smoking and health.

The Staff similarly misstates the law when it implies that cigarette advertising is deceptive because consumers allegedly do not "spontaneously" and "consciously" recall the health warning at the time they make purchase decisions. Report at 4-9. The only relevant question under Section 5 is whether an advertisement is deceptive. We are aware of no case, and the Report cites none, that holds an advertiser responsible for the failure of consumers to retain the message

in an advertisement. Indeed, the Consent Orders entered into in 1972 between the FTC and the six major cigarette companies require only clear and conspicuous disclosure of the cigarette warning in advertising; no provision of these orders relates in any way to consumer recall.

Congressional action and policy preclude the FTC from adopting any of the proposals contained in the Report. Since the original Surgeon General's Report was issued in 1964, Congress has maintained an active and indeed predominant role in monitoring the smoking and health controversy and the role of cigarette advertising. In the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1331, Congress mandated a warning notice to inform consumers about the Surgeon General's opinion with respect to the health consequences of smoking. When in 1969 Congress determined that the original warning notice required by the 1965 Act should be changed, it amended the Act. The Act as amended thus represents a Congressional determination that the present warning is adequate to inform consumers about the asserted relationship between smoking and health. The Act also represents a determination that conflicting approaches to the regulation of cigarettes are improper and that a comprehensive uniform policy, legislatively formulated and articulated, is most beneficial to the public. Since that time, Congress consistently has taken an active interest in all matters relating to cigarettes and cigarette advertising, and despite annual

overtures by the FTC to do so has shown no dissatisfaction with the present health warning, either in packaging or in advertising. Under these circumstances, for the Commission to seek to make any changes on its own -- whether through adjudication or rulemaking -- would violate this clear policy of Congress.

The Staff's proposals are contrary to and precluded by recent action taken by the Commission itself with respect to the warning notice. The warning that the Staff criticizes as ineffective is included in all cigarette advertising precisely because the FTC chose in 1972 to resolve its charges that cigarette advertising was deceptive by entering into negotiated consent orders that provide for the inclusion of the warning notice. In July 1981, two months after the Staff issued its Report, the Commission entered into an overall settlement of civil penalty actions that it brought against the major cigarette manufacturers for alleged violations of the 1972 Consent Orders. As part of the settlement, the Commission agreed to entry of consent judgments which provide that the original Consent Orders "shall remain in full force and effect."

Having just months ago expressly reaffirmed the warning notice embodied in the original consent orders, it would be legally impermissible for the FTC to repudiate its agreement and impose new warning notices or other requirements on the cigarette manufacturers. The Supreme Court long ago

established that a consent decree can be changed only upon "a clear showing of grievous wrong evoked by new and unforeseen conditions." United States v. Swift & Co., 286 U.S. 106, 119 (1932). Obviously, all of the "new" information upon which the Staff's proposed "remedies" are based was known to the FTC at the time it chose to reaffirm the existing warning notice, and thus it is clear that the Report could not provide even a minimally adequate basis for satisfying the Swift standard.

Indeed, in light of the consent judgments the Staff's proposed change in the warning notice simply makes no sense. Public policy strongly favors the resolution of disputes by precisely the kind of negotiated settlement entered into between the FTC and the companies. This policy would be frustrated if, almost immediately after reaffirming its commitment to the 1972 Orders, the Commission blithely repudiated the current warning notice and sought to pursue a totally different regulatory approach.

The Staff's proposed "remedies" are inconsistent with the First Amendment. In its most recent discussion of the extent of First Amendment protection for commercial speech such as cigarette advertising, the Supreme Court rejected "the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech," and held that commercial speech may be regulated only if the regulation directly advances a substantial state interest and is no more extensive

than is necessary to serve the state interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). The Court stressed that the remedy "must be designed carefully to achieve the state's goal"; "may not be sustained if it provides only ineffective or remote support for the government's purpose"; and may not be "excessive." Id. at 564. The Staff's proposed remedies cannot meet this test.

5. The Staff's Proposed "Remedies" (Chap. V)
Are Ill-Considered.

The Report concludes by urging a variety of "remedies" for the "deception" identified by the Staff, most of which are completely beyond the FTC's authority. In the course of reaching these conclusions, the Staff misrepresents past industry action with respect to advertising. The Staff also fails to demonstrate that its proposal to change the size, shape, and content of the cigarette warning would lead to any increase in the present high level of consumer awareness. To the contrary, the rotational warnings proposal by the Staff are likely to impose an expensive burden on the cigarette industry with no corresponding benefit to the consumer.¹

The Surgeon General's warning has appeared with exact uniformity in its present form and wording since 1970. It is, quite literally, an American institution, familiar to

¹ See Tab V for further discussion of the Staff's proposed remedies.

all. The deletion of the reference to the Surgeon General, as the Staff recommends, would alter the basic character of the warning, with unpredictable effect.

After years of seeing a warning notice stating the Surgeon General's view that cigarette smoking is generally hazardous to health, consumers would read labels that attribute only a limited number of specific diseases to smoking. Consumers could well conclude that the Surgeon General has changed his opinion of the health consequences of smoking and has concluded that smoking is not generally hazardous to health. Moreover, since certain segments of the population, such as teenagers, are unlikely to consider lung cancer and heart disease as dangerous to them, the effect of such limited warnings on those groups would be to dilute the impact of the current warning.

It is also well established that mass-media health campaigns based on threats and fear, which is precisely the type of campaign proposed in the Report, are ineffective in increasing consumer awareness or belief.

The Report reveals that the Staff has given no thought whatever to these consequences of its proposal. Neither has the Staff made any effort to determine whether the warnings it is now proposing are likely to be more effective than the warning the FTC proposed a decade ago, which the Staff now finds to be deficient. Accordingly, there is no

reason to assume that the Staff's recommended "remedies" will serve any legitimate purpose whatever.

CONCLUSIONS

If there is one factor that has remained unchanged in the seventeen years since the Surgeon General's first report on smoking and health, it is the FTC Staff's campaign to discourage, if not prohibit, people from smoking. Since 1964, the FTC has periodically attempted to impose restrictions on cigarette advertising and packaging. Congress has twice, in 1965 and 1970, moved to rein in the agency, preempting the FTC's claimed power in the matter of agency-proposed warnings that went significantly beyond the medical evidence.

Yet, today, the FTC Staff's basic measure of the "effectiveness" of the current warning and the "deceptiveness" of cigarette advertising remains whether people are prompted to stop smoking. Even if it is assumed that everyone is "aware that smoking is hazardous," the Staff argues, everyone does not know "how dangerous smoking is," whether it has "personal relevance to themselves" and are therefore "less likely to consider health information at all in making their smoking decision." Report at 9 (emphasis in the original).

This objective of altering consumer behavior is not only an abuse of regulatory power but a fruitless exercise as well. Professor William Wilkie, in his June 1980 report to

the FTC on affirmative disclosure orders,¹ analyzed the range of potential objectives underlying the cigarette warning requirement, from changing consumer awareness about smoking and health to changing actual smoking behavior, and concluded that "the objectives in the original orders are unclear, and this may well contribute to potential difficulties in determining appropriate Commission action." Wilkie at 55-7. Professor Wilkie concluded further that examination of the objectives involving changes in personalized belief and behavior "suggests that it will be very difficult for any disclosure to achieve these sorts of effects in the real world." *Id.* at 58.

The Staff, however, apparently assumes that more information about the specific dangers attributed to smoking will lead to a decline in the number of people who smoke. Yet the 1980 Chilton Study, commissioned by the Staff and cited frequently in the Report, found unequivocally that "factual knowledge about the health consequences of smoking" is not related either to current smoking behavior or intentions to smoke in the future. Chilton Study at 22-3. Other studies relied upon by the Staff confirm this conclusion.

The tenuous relationship between knowledge and behavior demolishes the fundamental premise upon which the Report is based -- that consumers need more detailed information

¹ Wilkie, Affirmative Disclosure: A Survey and Evaluation of FTC Orders Issued from 1970-77 (1980).

about the health consequences of smoking in order to make informed decisions whether or not to smoke. Thus, given the fact that virtually all consumers are aware that smoking is alleged to be hazardous to health, and given the fact that more detailed awareness about smoking and health has no demonstrable effect on smoking behavior, the course of action proposed in the Report is pointless.

The Report should be rejected.

I.

I. CONSUMER AWARENESS OF THE SMOKING AND HEALTH
ISSUE

A. Consumers Are Neither Uninformed Nor
Misinformed About the Asserted Health
Hazards of Cigarette Smoking

1. The Statistics Demonstrate Awareness

The Staff necessarily concedes that "most people are generally aware that smoking is hazardous." Report at 3-5. That concession, however, minimizes and understates both how widespread and how specific that belief is. The 1978 Roper Study for The Tobacco Institute, cited in the Report, concludes that "the belief that smoking is hazardous to health is now almost totally accepted by Americans." 1978 Roper Study at 47. Similarly, the 1978 Gallup Opinion Index indicates that 90 percent of the respondents believe that smoking is hazardous to health.¹

This belief goes substantially beyond a generalized feeling. Nearly 2 out of 3 people believe that any amount of smoking is harmful, and half of the population believes that smoking makes a great deal of difference in life span. 1978 Roper Study Q16, 12. Almost 75 percent of the respondents in

¹ Indeed, the original warning phrase, "... may be hazardous to your health," has passed into the language and is heard daily in one context or another, serious and comic. For one example among the many that might be cited, a recent New York Times article on a study of the psychological effects of the small daily irritations in life began: "That stereo set blasting from the next apartment and all those other minor irritants in life may be hazardous to your health." (July 1, 1981, p. A19.) The allusion to the cigarette health warning is unmistakable.

the 1980 Roper Study believe that smoking greatly increases the risk of heart attack. 1980 Roper Study Q30. Well over 80 percent either "think" or "know" that smokers are "many more times as likely to develop lung cancer" as nonsmokers. Ibid. The 1980 Chilton Study conducted for the FTC found that more than 90 percent of the public believes that heart disease has been found to be associated with cigarette smoking. 1980 Chilton Study Q42e.

Both the 1980 Roper Study and the 1980 Chilton Study reveal consistent large majorities of people who believe that smoking is the cause of or related to virtually all of the diseases and health problems with which the Report expresses concern. The Chilton Study, for example, found that almost 90 percent of the respondents believe that smoking during pregnancy can have an effect on the smoker's baby, and almost three quarters believe that if a woman smokes and uses birth control pills, she increases her chance of having a heart attack. 1980 Chilton Study Q39, 53. The fact that so many people believe that claim is notable, since another study commissioned in connection with the Report found that consumers exposed to warnings about the synergistic effect of smoking and birth control pills on heart disease had difficulty understanding or assimilating that concept. Burke Focus Group Study at 11.

Consumer awareness of alleged health hazards extends even to issues that are not claimed by the Report to be

established as medical fact. Thus, 58 percent of the public believes that smoking is probably harmful to nonsmokers. 1978 Roper Study Q21. And while even the Staff claims only that "many experts" classify smoking as addictive (Report at 3-40), almost 50 percent of the public believes that smoking is addictive. 1978 Roper Study Q32.

In fact, a large number of people believe that smoking causes a variety of diseases and health problems that not even the Staff would attempt to link to smoking. According to the Chilton Study, over one quarter of the respondents believe that arthritis has been associated with smoking, and almost one quarter believe that appendicitis has been associated with smoking. 1980 Chilton Study Q24a, d. An astonishing two-thirds of respondents believe that teenagers who smoke suffer increased digestive upsets. *Id.* Q38d. The 1980 Roper Study conducted for the FTC reveals that one quarter of the public believes that smoking causes at least some cases of breast cancer. 1980 Roper Study Q29. In short, the proportion of people who erroneously believe that smoking causes these and other such illnesses substantially exceeds the proportion who do not believe that smoking causes certain illnesses that the Staff claims have been linked to smoking.

As discussed below (pp. 9-12), these percentages represent people who believe the various claims about smoking and health; the proportion of the public aware of such claims is necessarily even greater. Thus, a full examination of the

statistics presented in the various studies cited in the Report leads inevitably to the conclusion that if any fact is better known than the claim that smoking is hazardous to health, including the specific health hazards that the Staff has attributed to smoking, it has not been demonstrated. That is the starting point for any determination of the effectiveness of the present warning or of the need for a change in the warning.

2. The Staff Fails To Consider Whether
the Current Level of Awareness Can
Be Improved

Although the statistics quoted in the Report itself demonstrate an extremely high level of consumer awareness of virtually all facets of the smoking and health controversy, the Staff asserts repeatedly that significant numbers of people do not have the requisite information. Thus, while conceding that 90 percent of the population is aware of the Surgeon General's warning, the Staff notes that this means millions of people remain unaware of such information. Report at 17. But the Staff makes no effort to determine whether any greater level of awareness could be achieved. Had it considered that question, it would have been forced to conclude that consumer awareness of the smoking and health controversy is as high as can be expected.

The studies relied upon in the Report confirm that consumers already are fully aware of the alleged relationship between smoking and health. In the Burke Study conducted for

the FTC to test the recall of different types of proposed warnings, the maximum unaided recall of any warning was 64 percent for a lung cancer warning set in a circle. That percentage is not only far less than the percentage of the population that is aware of the asserted health consequences of smoking, it is substantially less than the percentage that already is aware of the claim that smoking causes lung cancer.

The Burke Study also revealed that the highest levels of recall related to matters of which consumers already are generally aware, such as lung cancer, and that the format of the warning, not the content, was the most significant factor in consumer recall. Thus, the Burke Study is consistent with accepted advertising principles that specific messages are likely only to confirm what people already know, or to lead to generalized beliefs -- in the case of cigarettes, precisely the information that is conveyed by the present warning label.¹

In sum, the Staff concludes that the cigarette warning is ineffective without ever considering whether the current levels of consumer awareness about smoking and health issues are high, average or low, or whether that awareness can be increased through advertising. Basic advertising theory,

¹ Further evidence of this principle is the finding of the Burke Study that specific cancer warnings were "no more effective than the non-cancer warnings in eliciting mentions of the relationship between smoking and cancer These remarks may reflect some general public awareness of the smoking-cancer association rather than memory for the ads." Burke Study Analysis at 9.

as well as the studies relied upon in the Report itself, establish that public awareness of smoking and health issues is extraordinarily high and unlikely to be increased. It is clear that the public is fully informed about the asserted health consequences of smoking under any standard other than the unrealistic and unattainable one of "perfect knowledge."

- B. Neither the Report Nor the Studies Upon Which It Relies Demonstrate That a Significant Portion of the Public Is Unaware of the Specifics and the Severity of the Health Hazards That the Staff Attributes to Smoking

A cornerstone of the Report is the Staff's conclusion that consumers lack sufficient specific knowledge of the nature or seriousness of the dangers the Staff attributes to cigarette smoking. That conclusion is based on the Staff's misinterpretation of the information contained in the various surveys and studies cited by the Staff, and the Staff's confusion of consumer awareness with consumer belief.

1. The Staff Misinterprets and Misuses the Studies

The Staff assumes throughout its discussion of consumer awareness that if a substantial number of consumers do not know a specific detail about the smoking and health issue (e.g., the claim that smoking during pregnancy increases the risk of stillbirth and miscarriage), those consumers are not sufficiently aware of the general proposition that encompasses that detail (e.g., the allegation that smoking during pregnancy increases the risk of adverse effects on the baby). This assumption is contrary to the actual results of the studies

cited by the Staff, which uniformly demonstrate that consumers generally are aware of all of the health dangers allegedly associated with smoking, even if they cannot respond correctly with precise medical statistics concerning those asserted dangers. Moreover, the Staff's assumption that a person cannot know of a general fact unless he knows of a specific application of that fact is clearly wrong as a matter of basic logic.

The Report also misuses the results of the detailed questions included in the studies. Respondents were asked numerous questions involving specific numbers (e.g., "Out of every hundred people who get lung cancer, how many die from it?"). The Report considers that anyone answering with other than the correct number is unaware of or misinformed about the general fact to which the number relates. But as the Report itself admits, "some of this lack of knowledge, of course, is due to the use of a specific figure . . . in the question rather than real consumer misunderstanding." Report at 3-22. In fact, none of the questions requiring the selection of a specific number, ratio, or percentage can be considered an accurate indication of consumer knowledge or awareness about a specific health problem.¹

¹ In the example given, from the Chilton Study, only 11.6 percent of teenagers and 10.8 percent of adults gave the correct answer, 95. Almost 80 percent of teenagers and adults, however, answered either 45, 75, or 95. Thus, the Report's conclusion that "many people do not appreciate the severity of lung cancer" (Report at 3-23) unfairly misrepresents the fact

(Footnote cont'd)

The Staff also grossly misinterprets the statistics by summarizing all responses other than the one deemed correct by the Staff, including "don't know" answers and reasonably close estimates, as representing people who are completely unaware of a particular fact or statement. Such responses, however, are equally susceptible to the interpretation that the respondent is generally aware of the fact or statement but is unsure of the precise number involved. In the previously described example, a person who believed that most people with lung cancer die from that disease, but was not sure whether the correct proportion is 90, 95, or 97 of 100, might fall into the "don't know" category and therefore would be considered by the Report as a person who is unaware of the severity of lung cancer. In an analogous situation, it is likely that a majority of the population does not know the precise number of deaths caused each year by traffic accidents, but nonetheless is well aware that traffic accidents cause a substantial number of deaths and are a serious problem in this country.

2. Confusion Between Consumer Awareness and Belief

The most serious misinterpretation, and one that renders the entire Report useless, is the Staff's confusion between consumer awareness and belief. The studies relied upon by the Staff to demonstrate "knowledge" or awareness did

(footnote cont'd)

that the vast majority of people are aware that lung cancer is alleged to have a high mortality rate of at least 1 of every 2 of those suffering from the disease.

not examine those issues. The 1980 Roper Study, for example, consists in large part of asking people "how true you personally think" a particular statement is. Respondents were permitted to answer "know it's true", "think it's true," "don't know if it's true," "think it's not true," or "know it's not true." The Staff and the study concluded that those responding in the latter three categories are "unaware" of the information conveyed by the specific statements made. It is obvious, however, that a respondent could be aware of a claim (e.g., that smoking increases the risk of heart attack) but nonetheless believe the claim to be untrue.¹ Similarly, the Chilton Study contains numerous "true-false" questions that determine belief rather than knowledge. Even so, most people responded to such questions with the answers judged "correct" by the Staff. Almost 75 percent, for example, believe smoking does greatly increase the risk of heart attack. This high level of belief concerning a controversial issue, as opposed to mere awareness, is remarkable.

The element of disbelief is most apparent with respect to smokers. The Staff makes much of the fact that while 90 percent of the population believes that smoking is

¹ A similar error is apparent in the Staff's interpretation of the Shor Study. As indicated in the Report, respondents in that study were asked to rate statements according to whether the respondents strongly believed, believed, were neutral or uncertain, disbelieved, or strongly disbelieved the statement. The Report took the results of this study, which on their face are directed only to the respondents' beliefs, and concluded that where respondents either disbelieved or were neutral about a statement, the respondents did not know the "fact" that the statement represented.

harmful to health, "24% of heavy smokers do not know or believe it is hazardous." Report at 3-5. But the Staff conveniently ignores the fact that the health consequences of smoking remain a controversy and that people are entitled to disbelieve the Staff-approved version. The fact that smokers consistently respond less affirmatively than nonsmokers to statements about the health hazards of smoking demonstrates that belief, not awareness, is the factor being tested by the studies.

Had the studies been aimed at measuring awareness as opposed to belief, the questions could have been designed to elicit that information. For instance, respondents could have been asked whether they had read or heard that smoking is a major cause of certain diseases, or whether they are aware that the Surgeon General has reached certain conclusions about the health consequences of cigarette smoking. In the Chilton Study, several questions were designed to elicit such awareness. Respondents were asked whether particular diseases had "been found to be associated with cigarette smoking." Notably, responses to such questions indicated that the vast majority of people are familiar with the various health claims discussed in the Report.¹

¹ For example, over 81 percent of teenagers and 87 percent of adults agreed that cancer of the mouth has been found to be associated with cigarette smoking. Chilton Study Q41-C. 82 percent of teenagers and 87 percent of adults agreed that chronic bronchitis has been found to be associated with smoking. Similar high percentages responded affirmatively to such questions concerning emphysema and heart disease.

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In fact, when the questions reflecting general awareness about the asserted health hazards of cigarette smoking are extracted from the overall studies, they establish precisely the opposite of what the Staff concludes. Most people are not only fully aware that the Surgeon General has concluded that smoking is hazardous to health in a variety of ways, but to a large extent believe those conclusions.

II.

II. THE SMOKING AND HEALTH CONTROVERSY

The Federal Register notice of June 10, 1981, asks two questions about the Report's discussion of "evidence linking smoking with many specific health consequences." The questions are: (1) "Has the staff accurately summarized the available medical evidence?" (2) "Is there additional evidence which should be considered?"

The Staff summary is so inaccurate and so prejudiced that it would be fruitless to provide "additional evidence" to be "considered." The Staff obviously has decided to impose scientific conclusions by fiat and to find a way to correct anyone who does not give an "acceptable" answer to such conclusions.

A. The Staff's Review of the Evidence on Smoking and Health Is Biased

In many respects, the Report is similar to other government reports on smoking and health, in which the repetition of old claims is a vehicle used to support the position that new evidence has been discovered or that previously stated conclusions are more credible. A prime example of the use of this technique in the present Report is the Staff's citation of the "fact" that 300,000 deaths annually are caused by smoking to support its claim that smoking is known to be more hazardous to health than was thought in 1964. Report at 11. The "300,000 deaths" figure, however, is not fact but rather has been part of the folklore of the anti-smoking campaign since at least 1965. It has not only not changed

since 1965, it was discredited when it was first published and it remains discredited today. When several anti-tobacco scientists used the 300,000 figure during congressional hearings in 1965, all conceded that they had gotten the figure from one of two sources, each of whom credited the other as his source.¹ There was no scientifically adequate statistical basis for the figure in either case. Nevertheless, this number has been bandied about for seventeen years as a scare tactic, handy to pull out as "proof" that some further restriction of cigarette advertising is necessary. It is disappointing, but not surprising, that the Staff has cited this number as "fact" in the current Report. It is inexcusable, however, that the Staff then uses that figure as an example of the ineffectiveness of the cigarette warning because many people do not "know" this newly discovered "fact."

The information summarized in the Report does not establish a causal relationship between smoking and diseases statistically associated with smoking. It does not establish a causal relationship between smoking and lung cancer, heart disease or chronic obstructive lung disease. It does not establish a causal relationship between smoking and fetal injury. It does not prove interaction between smoking and birth control pills or occupational exposures. It does not

¹ [To be included.]

prove that carbon monoxide as found in tobacco smoke is dangerous. In short, the Report is a totally inadequate review of the scientific controversies that surround the many questions of smoking and health.

B. The Staff's Discussion of Smoking's Alleged Connection With Specific Health Hazards Is Biased

Specific examples of the Staff's bias abound.

With respect to pregnancy, for example, a recent editorial on "Precursors of Preterm Delivery" appearing in the Lancet, May 16, 1981, commented on a number of variables identified in a study of low birth weight babies:

"At first sight many of the above factors raise hopes of preventive measures such as family planning, restriction of smoking and alcohol consumption, an appropriate diet, and exercise. But, supposing that women were prepared to modify their behaviour and that they had access to safe contraception and that tobacco promotions were banned and smoking and drinking during pregnancy discouraged -- could we promise a drop in preterm delivery? The answer must be in the negative. No amount of mathematical manipulation can show that such associations are directly causal rather than purely indicative of a certain type of person."
(Emphasis supplied)¹

Yet the Report states unequivocally: "Studies show that maternal smoking during pregnancy . . . leads to significantly smaller average birth weight. However, a large percentage of people . . . are not aware of the serious consequences

¹ "Precursors of Preterm Delivery," Lancet I: 1087-1088, May 16, 1981.

of maternal smoking during pregnancy." Report at 3-34 (Emphasis supplied).

That statement is a parody of science and semantics. The editorial board of a major medical journal such as Lancet cannot say that it knows that smoking causes light weight babies, yet the Staff concludes that cigarette advertising is deceptive because many lay persons do not "know" what the Staff simply asserts to be a fact.

The Report's summary of low-"tar" cigarettes provides a similar example. The smoking and health controversy has not been notable for producing FTC staff objectivity on the issue of "tar" and nicotine, and the current Report has carried on this tradition.

In 1959 the FTC informed cigarette manufacturers that it considered "all representations of low or reduced tar or nicotine, whether by filtration or otherwise, to be health claims" and forbidden by the Commission's Cigarette Advertising Guides.¹ During congressional hearings in 1965, the Chairman of the FTC specifically warned that calling attention to "tar" and nicotine figures could result in "misleading" the public.² Less than a year later, in March 1966, the FTC announced a complete reversal of its position: cigarette manufacturers would

¹ Correspondence, Brain, W., Federal Trade Commission, to Bowman Gray, President, R. J. Reynolds Tobacco Company, December 17, 1959.

² Hearings on Cigarette Labeling and Advertising Before the Senate Comm. on Commerce, 89th Cong., 1st Sess., pt. 1, at 419 (1965).

be permitted to disclose "tar" and nicotine content in advertising. The reason given was that the information "may be material and desired by the consuming public."¹

The Public Health Service held a meeting in June 1966 on "tar" and nicotine. The PHS stated in its report following that meeting that the "preponderance" of existing evidence "strongly suggests" that the lower the "tar" and nicotine content of cigarettes, the less harmful the effects.² This position was adopted by the FTC and the industry was encouraged to reduce "tar" and nicotine content.

In November 1967 the FTC published the results of the first of twenty-one tests of "tar" and nicotine yields made in its cigarette testing laboratory. In 1970, the FTC proposed a rule requiring "tar" and nicotine listing in cigarette advertising. In response to this action, cigarette manufacturers agreed voluntarily to disclose "tar" and nicotine content of cigarettes in all advertising. This plan was accepted by the Commission.

In 1972, then Senator Moss, no friend of smoking, said: "Several cigarette marketers as well as the Public Health Service have made significant efforts to promote low

¹ Federal Trade Commission, News Release, March 25, 1966.

² Public Health Service Technical Report. Reviewing Progress Made Toward the Development and Marketing of a Less Hazardous Cigarette, 90th Cong., 1st Sess., at 7 (1968).

tar and nicotine content. That activity is to be commended since much of it has been done in a fairly responsible manner."¹

Nearly 50 percent of cigarettes sold today are in the "low tar" segment of the market (less than 15 milligrams). For some time it has been acknowledged that the average "tar" and nicotine content of cigarettes has been reduced by over 50 percent since the 1950's. In fact, sales-weighted average "tar" content has dropped from 38.4 milligrams in 1956 to 13.2 in 1980.

Yet the Report, in its universal condemnation of tobacco, downplays the industry's reduction of "tar" and nicotine. A multitude of speculations are advanced and the Staff says: "Given the current state of scientific knowledge, it is, therefore, necessary to proceed cautiously before concluding whether low 'tar' and nicotine cigarettes are significantly less dangerous than other cigarettes." Report at 1-52. What-ever happened to the "strongly" suggestive evidence the FTC referred to fifteen years ago which led it to encourage the reduction of "tar" and nicotine content?

C. The Staff's Discussion of the Tobacco Industry's Position With Respect to the Scientific Evidence Is Biased

The Staff's attack (at pp. 1-58 through 1-65) on the positions set forth in a 1979 review of the smoking and health

¹ Hearings on Public Health Cigarette Amendments of 1971, Before the Senate Comm. on Commerce, 92nd Cong., 2nd Sess., pt. 1, at 2 (1972).

controversy by The Tobacco Institute reveals the extent of the Staff's bias¹ and the consequent flaws in the Report's review of the evidence concerning smoking and health.

Thus, for example, the Staff attempts to refute the position that epidemiological studies cannot establish causation, and in doing so reveals a basic misunderstanding of epidemiology and its legitimate uses. Consider a few scientific comments on the subject:

"[T]he elementary but highly seductive fallacy of identifying association with causation continues to plague many studies."²

* * * * *

In medicine, much more than correlation is necessary to establish causation.³

* * * * *

Epidemiological studies, even prospective ones like the Seven Countries Study, cannot prove cause-and-effect when the end-point, 'effect', is an outcome of a chronic noncommunicable condition. . . . epidemiological evidence can be cited only as being consistent, or inconsistent, with the hypothesis in question."⁴

¹ The Tobacco Institute review also demonstrates that the 1979 Surgeon General's report (heavily relied upon by the Staff) itself failed adequately to report on the scientific state of the art.

² Burch, P., "Pathology, Inference, and Carcinogenesis," Pathol Annu, Part II, 15: 21-44, 1980.

³ Colton, T., Statistics in Medicine (Boston: Little, Brown and Company, 1974).

⁴ Keys, A., et al., "The Diet and All-Causes Death Rate in the Seven Countries Study," Lancet II: 58-61, July 11, 1981.

Distinguished scientists continue to adhere to the basic premise asserted by Fisher, Berkson and others that statistical comparison between smokers and nonsmokers cannot establish cause and effect.¹ People self-select whether they will smoke or not, how much they will smoke and whether they will quit. This remains as true today as it was a quarter-century ago.

The tobacco industry is not "attacking" epidemiology in pointing out these limitations. Rather, it is raising a legitimate criticism of the extrapolation and decision-making that can occur when such limitations are ignored.

The Staff -- anxious to make a point -- has ignored more than the warnings about the limitations of epidemiology. It has also disregarded the many shortcomings of epidemiological studies used against smoking. While the Report criticizes the tobacco industry for challenging "the design or methodology of the studies relied upon to show the health hazards of smoking" (Report at 1-63), this comment simply illustrates the Staff's unwillingness to acknowledge the questionable quality of many population studies. It would be hard to believe, for example, that the Staff has never considered the work of Dr. Alvan Feinstein, Professor of Medicine and Epidemiology at Yale University. Dr. Feinstein has described repeatedly how detection bias (looking harder for lung cancer in smokers and

¹ Fisher, R., Smoking. The Cancer Controversy (Edinburgh: Oliver and Boyd, 1959).

therefore finding it more often) can distort statistical data about smoking and lung cancer.¹ The Staff has similarly omitted mention of Dr. Theodor Sterling, an expert in computerized health information who has reviewed the data from two large epidemiological studies frequently cited as "proof" that smoking causes disease. In one such study, he found basic errors in classifying people according to their smoking habits.² In the other, he found that certain disease patterns in the study population (e.g., breast cancer, lung cancer, emphysema) were considerably higher than in the U. S. population it is supposed to represent.³ Government scientists have also criticized these studies: "While several significant studies had been conducted earlier, such as those by Hammond and Horn, they were for the most part not based on scientifically designed probability samples, and were therefore more subject to the criticism

¹ Feinstein, A. and C. Wells, "Cigarette Smoking and Lung Cancer: The Problems of 'Detection Bias' in Epidemiologic Rates of Disease," Clin Res 22(3): 535A, April, 1974; Feinstein, A., Quoted in "Smoking Link to Lung Ca Termed Diagnostic Bias," Family Practice News, July 15, 1974; Feinstein, A. and C. Wells, "Cigarette Smoking and Lung Cancer: The Problems of 'Detection Bias' in Epidemiologic Rates of Disease," Trans Assoc Am Physicians 87: 180-185, 1974.

² Sterling, T., "What Happens When Major Errors Are Discovered Long After an Important Report Has Been Published," Presentation before the American Statistical Association Annual Meeting, Washington, D.C., August 16, 1979.

³ Sterling, T., "A Critical Reassessment of the Evidence Bearing on Smoking as the Cause of Lung Cancer," Am J Public Health 65(9): 939-953, September, 1975.

that the finding could not be generalized to the total population."¹

The Staff also argues that conclusions about causation can be made without understanding the biology of how a disease is caused. Report at 1-61 and 1-62. This attempt to downplay biologic mechanisms is predictable. The Staff wants to draw firm conclusions in the face of numerous questions that remain in the area of basic science. For example, while "no well-designed and well-conducted experiments have shown that cigarette smoke causes lung cancer in animals,"² the Report totally ignores the implications of such negative animal data.

The Staff's argument that biologic mechanisms are insignificant is also hard to take seriously in light of its discussion about heart disease. The Staff has taken a "causation made easy" approach to heart disease: it states that smoking is one of the three major risk factors for heart attack, and then assumes that smoking accounts for one-third of all deaths from coronary heart disease. Report at 1-18. This naive reasoning completely ignores several indisputable facts that contradict the Staff's conclusion: (1) the major

¹ Wilson, R., Statement, National Commission for Smoking and Public Policy, Philadelphia, Pennsylvania, June 16, 1977.

² Feinstein, A., Comments in "Discussion" of presentation by P. Burch, Smoking and Lung Cancer: The Problem of Inferring Cause (With Discussion), J R Statist Soc A 141(Part 4): 437-477, 1978.

studies on heart disease list far more than three risk factors, (2) risk factors are not necessarily causes, and (3) meaningful figures cannot be obtained by dividing the number of coronary heart disease deaths by the number of risk factors.

Developments in research on atherosclerosis illustrate the importance of biological mechanisms. Certain animal research by Astrup and co-workers has been cited for the past fifteen years as "proof" that the mechanism by which smoking supposedly causes heart disease involved carbon monoxide ("CO").¹ In the 1970's, doubt was expressed about the Astrup findings because other researchers were unable to confirm them.² Finally, the Astrup group tried to reproduce their earlier results and found that "no significant morphological changes were present to discriminate between experimental and control animals."³ Perhaps more clearly than any other recent experience, this turnabout on heart disease highlights the necessity of scrutinizing easy answers and emphasizing biologic

¹ Astrup, P., et al., "Enhancing Influence of Carbon Monoxide on the Development of Atheromatosis in Cholesterol-Fed Rabbits," J Atherosclerosis Res 7: 343-354, 1967.

² Armitage, A., et al., "The Effects of Carbon Monoxide on the Development of Atherosclerosis in the White Carneau Pigeon," Atherosclerosis 23(2): 333-344, 1976.

Theodore, J., et al., "Toxicological Evaluation of Carbon Monoxide in Humans and Other Mammalian Species," J Occup Med 13(5): 242-255, May, 1971.

³ Hugod, C. and P. Astrup, "Morphological Investigations on Histotoxicity of Gas Phase Constituents of Tobacco Smoke in the Rabbit," Abstracts of the Fourth World Conference on Smoking and Health, Stockholm, Sweden, June 15-21, 1979.

mechanisms. Yet the 1981 Surgeon General's Report describes Astrup's initial work on atherogenesis without mentioning the later disavowal.¹

The Staff is also unconvincing in its attempt to discredit the constitutional hypothesis that smokers are more prone to disease than nonsmokers because of certain underlying constitutional differences between the groups. Report at 1-62, 1-63. Many studies have found that smokers as a group differ from nonsmokers. Cigarette smokers may tend to be more active, more extroverted -- and more prone to Type A behavior -- than nonsmokers. When such genetic and lifestyle differences repeatedly occur, is it not reasonable to study the hypothesis that differences in disease patterns are related to factors other than their smoking? The tobacco industry does not maintain that a constitutional/stress theory is the explanation. It does believe, however, that serious consideration must be given to alternative explanations -- consideration that cannot be accomplished in the presence of biased, dogmatic and foregone conclusions.

¹ 1981 Report of the Surgeon General, p. 118.

III.

III. THE NATURE AND PURPOSE OF CIGARETTE ADVERTISING

Since the Report is the result of a comprehensive five-year investigation of cigarette advertising, it might be expected that the Staff would devote substantial and careful attention to that subject. This is not the case. In a Report not characterized by clear or objective analysis, the discussion of the nature and effect of cigarette advertising stands out as the briefest and most superficial. The Report clings single-mindedly to the unfounded notion that cigarette advertising is aimed at luring nonsmokers to take up smoking even though it is clear that the objective of cigarette advertising is to persuade smokers to select a particular brand of cigarettes.

A. Cigarette Advertising Is Intended To Persuade Smokers To Purchase a Particular Brand of Cigarettes

The Staff has attempted to create the impression that the tobacco industry has used advertising to subvert the conclusions of the Surgeon General in an attempt to persuade people to smoke. Thus, the Report begins its discussion of cigarette advertising with the observations that "cigarette advertising continues to be pervasive in American society," and "is a dominant force in" print and outdoor advertising media. Report at 2-1 (emphasis added). One wonders how any form of communication that is completely excluded from television and radio can be considered pervasive in contemporary society. And the phrase "dominant force" suggests that unlike

advertisers in any other consumer product industry. Advertisers exert some mysterious or unseen influence, presumably in an evil cause. The facts are quite different from these and similar insinuations that pepper the Report.

Cigarette advertising has been shaped by circumstances. Following removal of cigarette advertising from the broadcast media and its resulting confinement to the less effective print media, the industry made compensatory increases in advertising expenditures to offset the loss of radio and TV exposure. As discussed in the 1969 FTC Cigarette Report, pp. 7 and 10, radio and television accounted for more than three-fourths of all cigarette advertising expenditures in the years preceding the broadcast ban. The necessary adjustment in advertising practices was obviously tremendous, and completely unprecedented in any consumer-goods industry.

At the same time, cigarettes were changing, and brands were proliferating in an unprecedented manner. The cigarette market is in the midst of experiencing, and adapting to, a major shift in consumer preference in favor of lower "tar" cigarettes, and every cigarette manufacturer, to remain competitive, must be represented in that expanding segment of the market. Low "tar" brands accounted for more than 40 percent of all cigarette sales in 1980, compared to 2 percent just six years earlier. Today there are more than 180 different brands or brand variations competing for market shares. This is a market development that the FTC itself has long sought:

"The Commission hopes that the proposal to disclose tar and nicotine content in cigarette advertising made by eight manufacturers . . . when implemented will lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette, and resultant competition to meet that interest." 1970 FTC Cigarette Report, p. 15.

In response to these shifting consumer preferences, there have been frequent new brand introductions in recent years that require especially heavy advertising efforts in order to bring them to smokers' attention. This is a simple fact of marketing life that earlier FTC studies have examined in detail, and which the authors of the current Report have conveniently chosen to ignore. In 1979, for example, the Staff of the FTC Bureau of Economics reported:

"Being first in the market is not a substitute for advertising. On the contrary, where price competition is significantly absent, advertising becomes increasingly more important to new entry. In his study of cigarettes, Alemson notes:

'Advertising, through various media, is instrumental in informing the largest possible number of people . . . that the newly launched cigarette brand is exclusively designed to cater to their particular tastes. Market segmentation . . . would be inoperative without the appropriate use of advertising [Alemson, 1970, p. 296].

By informing a large number of potential consumers, advertising may serve as a catalyst, popularizing the new brand and speeding its growth and acceptance. If the advertising makes an association between the popular

tastes and the brand, consumers may bestow a long-term benefit to the brand by identifying the brand with the newly formed submarket."¹

The tremendous effect of brand proliferation on advertising expenditures is revealed in the Report itself, although the Staff did not recognize it because of its failure to engage in any meaningful analysis of the data. Thus, the Report states that the real growth in cigarette advertising between 1967 and 1979 was more than 50 percent. Report at 2-4. It then states that the percentage of cigarette advertising for the newer, low "tar" cigarettes increased from 5.5 percent of the total in 1967 to 66.9 percent in 1979 (*id.* at 2-7), which means that the newer brands account for more than the entire increase in cigarette advertising. The advertising for the older brands actually has declined in real terms by almost 50 percent.

When business magazines, which have no axe to grind on the smoking-and-health issue, report on cigarette advertising practices, they also perceive that the advertising is entirely brand oriented. Business Week (which carries no cigarette advertising itself) recently reported on cigarette marketing in its issue of December 15, 1980, pp. 56-57. The article contained a full description of the intensely competitive character of the cigarette market, and reflected the

¹ Whitten, Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-74, Bureau of Economics Staff Report to the Federal Trade Commission (June 1979), pp. 6-7.

very small slices of market share by which success is measured in the industry. For example, the Newport brand moved up five notches on the industry sales chart by virtue of an 18.5 percent sales increase in 1980, but ended up with a total market share of only 1.9 percent. Indeed, the difference in market share between Newport, which ranked 13th in sales, and Tareyton, the brand five notches below it in 18th place with a 1.69 percent market share, was only one-fifth of one percent.

As a practical matter, therefore, it is evident that a cigarette advertiser need achieve only a very limited objective, switching the brand preference of a small portion of existing smokers, in order to enjoy notable commercial success. Yet the superficial Staff study of "recent cigarette advertising" and the "overall advertising context" (Report at 2-1) does not even mention the brand-promotion purpose of cigarette advertising.

B. Cigarette Advertising Has Not Had the Effect of Increasing the Number of People Who Smoke

Not only is cigarette advertising not designed to promote smoking; it has not had that effect. Government authorities confirm this fact. The Public Health Service, for example, reports a sharp drop in smoking among young people:

"Perhaps the most dramatic change in substance use now taking place among American young people is the sharp drop in regular cigarette smoking. (Daily use dropped 4% this year to 21%.) The rate of decline appeared to accelerate this year among both males and females. We are inclined to attribute this change to a long-term increase in young people's health concerns about

smoking as well as to a sharp decrease in the perceived peer acceptance of smoking." National Institute on Drug Abuse, Highlights From Student Drug Use in America 1975-1980, p. 7.

The National Institute found that the proportion of high-school seniors who say their peers would disapprove of their smoking has risen from 55 percent in 1975 to 74 percent in 1980, and the proportion of them who expressed personal disapproval of pack-a-day smoking has increased from 66 percent in 1977 to 71 percent in 1980. (Id., p. 97.) Similarly, the Surgeon General's 1979 Report, pp. 17-15, says that "cigarette ads are perceived by teenagers as hypocritical and are listed as 'least-liked'"

In the real world in recent years there have been dramatic changes in market shares and ranking among the cigarette manufacturers and among brands, plus a spectacular multiplication of brands, without significant increase in total volume. It is demonstrable that almost the entire growth of the newer, low-"tar" cigarette brands has been at the expense of the older, "full-flavor" brands, some of which have all but disappeared from the market. These facts strongly confirm the view generally held by all but the FTC Staff that both the purpose and the effect of cigarette advertising is strictly inter-brand competition.

C. Cigarette Advertisements Are Brand Promotional and Make No Explicit or Implicit Health Claims

In criticizing the themes and images commonly used in cigarette advertising without even recognizing that such

images are important brand-identification tools, the Staff holds doggedly to the assumption that such images are designed to tout the desirability of smoking generally, in order to convert nonsmokers to smokers. The basis for this assumption, supported only by its frequent repetition, goes completely unexamined or supported in the Report.

The fact is that the content of cigarette advertising is not directed to nonsmokers, but rather is completely consistent with the goal of inter-brand competition. Cigarettes are advertised and sold exclusively on the basis of brand identification, with virtually no reference to the manufacturer's identity. Each advertisement extols the virtues of a particular brand; none promotes a particular company's stable of brands or the notion that smoking in general is desirable.

The inference drawn in the Report that the use of attractive, young-adult models, many portrayed in the context of outdoor activity, are implicit health claims is highly imaginative but baseless. Cigarette advertisements are no different in this respect than advertisements for such consumer products as soft drinks, beer and cosmetics. It is normal and reasonable to have the models engaged in activities that are popular with, and typical of, the age group that are the principal consumers of cigarettes. And since the main theme of most cigarette advertising is good taste and pleasure, the illustrations used are naturally chosen to evoke an association with pleasurable images.

The Staff complains that cigarette advertising portrays smoking as compatible with a wide range of athletic and healthful activities. Report at 2-13. But many tennis players, surfboarders, professional athletes, manual laborers and others who engage in athletic or other physical and healthful activities are also smokers. They and other smokers generally look, feel and act about the same as nonsmokers. In fact, studies reported by the Surgeon General show that smokers tend to be more extroverted, sociable and care-free than nonsmokers (1964 Report, pp. 365-366; 1979 Report, pp. 18-5-18-7), and some studies have shown that smokers tend to participate more often in sports and physical activity and to have larger body dimensions than nonsmokers. (1964 Report, pp. 372-373, 385-386).

Clearly, there is no basis for the Staff's implications that the models and settings used in cigarette advertising are not fairly representative of the young-adult age group whose members are the principal consumers of cigarettes and of the kinds of activities they typically enjoy. As to their apparently healthful looks, most persons in that age group, whether smokers or not, look perfectly normal and healthy. The models used in cigarette advertising are not more attrac-

...and the models used in cigarette advertising are not more attrac-

setting. Menthol cigarette advertisements often feature green colors, leafy glades, snow-capped mountains, waterfalls and other scenes evoking the image of cool, refreshing taste. Nothing could be more appropriate. Such images are universally used to represent the cool sensation of menthol or mint, whether the product be cigarettes or shaving cream, but the Staff somehow finds hidden health messages when the product is cigarettes.

The use of seasonal themes is also considered subversive, as evidenced by the Report's denunciation of a "Christmas advertisement for Marlboro" that allegedly portrayed the "reflective pleasure of tobacco" and unified "the desire for a perfect Christmas with the experience of smoking." Report at 2-2 and 2-3. The Staff failed to mention that Clement Moore employed the same anxiety-relieving technique in his subversive portrayal of a wreath of smoke encircling the head of a pipe-smoking Saint Nick as he paused by the fireplace.

The Report's criticism of the industry's vigorous competitive promotion of low "tar" and nicotine cigarettes is equally strained and more than a little disingenuous in its attempt to create the impression that it is the tobacco industry, rather than the government itself, along with private health agencies, that has actively publicized and promoted the idea that low-"tar" cigarettes are less hazardous to health. As stated earlier, when the FTC decided in 1959 that "all

representations of low or reduced tar . . . will be construed as health claims," the industry voluntarily agreed to eliminate all references to "tar" from its advertising. It was the FTC itself that, a few years later, reversed its position and initiated a campaign that resulted in the industry's acceptance of the Commission's request that all cigarette advertising disclose "tar" and nicotine content. Now the industry is taken to task for advertising precisely what the FTC required it to advertise.

This indiscriminating and unrelenting criticism of any cigarette advertising theme is not new; the Report is merely the latest in a long and repetitious line of FTC annual reports on cigarette advertising that have found each and every "image" employed in any cigarette advertisement to be designed for some improper purpose through the technique of "associating cigarette smoking with individuals, groups or ideas worthy of emulation or likely to be emulated." 1969 FTC Cigarette Report, p. 14. Thus, the current Report complains about the use of images of active, outdoor types, as well as about sophisticated women in evening dresses, about images of lean, white cigarettes and slim, brown cigarettes. Report at 2-11, 2-12. Previous FTC reports have singled out for mention images of a "serious, work-shirt clad woman," and other "depictions of women in work situations" (1974 Report, pp. 5-6); a "serious blue-jean clad man and the equally serious man in a business suit and tie" (*id.*, p. 5); "fashionably

attired, contemporary women" and "a feminine image . . . which featured floral arrangements as a background" (1971 Report, p. 11); "a no-frills masculine individual" who resists "fads and gimmicks" (*ibid.*); "choosy men and women who 'won't settle for less'" (*ibid.*); a couple sitting in a stadium in the rain who don't "cop out" (*ibid.*); "individual men and women, as well as couples, relaxed during numerous 'L&M moments'" (*ibid.*); "men of the sea" (1970 Report, p. 8); "stylish young female models in such glamorous settings as a castle, a sailboat, and a Mercedes roadster" (*id.*, p. 9); "an intense young couple who stared straight ahead, with a somewhat brooding look on their intelligent, stylish faces" (*id.*, p. 10); couples "depicted in gourmet food stores, unfinished furniture shops, and at home in their own flower garden, displaying their sophisticated good taste" (*ibid.*); an "enigmatic, sinister fellow in the wrap-around shades" (*ibid.*); the "nice" Lark people, "such work-a-day folk as barbers, tailors, housewives, photographers, secretaries, weekend golfers, and poker players" shown in settings that "are definitely middle class and usually not glamorous" (*ibid.*).

In sum, it is clear that literally any advertising theme or illustration that a cigarette manufacturer may choose to use will be criticized by the Staff no matter how great the strain on credibility. That is because the Staff opposes cigarette advertising of any sort. The 1970 FTC Report contained the penetrating observation that "all cigarette

advertising observed to date presents the advertised brand in a favorable light," and then proceeded with the following criticism of that phenomenon, disclosing the Staff's view of how the cigarette companies ought to advertise their products:

"In addition to this general tendency of all cigarette advertising [by its mere existence] to allay fears about the danger to health, many specific advertisements and campaigns help relieve anxieties by the scenes they depict. When people are displayed, whatever their age, occupation or activities, they are happy, and apparently healthy people. The Marlboro cowboy is seen galloping through the rain or sitting around a campfire, not occupying a bed in an emphysema ward, or even a lonely bunkhouse. An "L&M moment" never takes place on the steps of a church immediately after a funeral, or anywhere near a hospital." Id. at 11.

This relentlessly hostile and punitive approach to commercial advertising, divorced from any semblance of objectivity or practicality, characterizes the present Report as well, and substantially undermines the Staff's discussion and conclusions about cigarette advertising.

IV.

IV. THE LAW APPLICABLE TO CIGARETTE ADVERTISING

A. Cigarette Advertising Is Not Deceptive Within the Meaning of Section 5

Even the Staff does not contend that cigarette advertising contains affirmative claims concerning health. To the contrary, every cigarette advertisement carries an affirmative health warning, unlike advertisements for other consumer products such as meat, eggs, alcoholic beverages, hair dryers, and cosmetics that also have been linked by various government agencies to various health hazards. The Staff is thus reduced to the novel theory that such advertising is deceptive if it does not affirmatively and successfully educate every member of the public about every detail of the massive compilation of statistics and observations set forth in the 1,158 page 1979 Surgeon General's Report -- or more to the point, if it omits information that in the Staff's view would induce consumers to stop smoking if they were aware of it. There is no legal basis for such a theory.¹

¹ The Staff's theory of deception is of course predicated on the acceptance of the Report's summary of the smoking and health controversy as fact. As we have demonstrated in these comments, that predicate is erroneous. At best, the health claims made by the government and rehashed in the Report create a controversy that need not be disclosed in advertising unless the advertiser makes a representation concerning one side of that controversy. National Commission on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977). Since cigarette advertisements make no such representations, disclosure of the Staff's views is not required in such advertisements. In any event, the current warning included in every cigarette advertisement sets forth the essence of the government position on the smoking and health controversy.

An advertiser has no duty to educate the public or counter erroneous public beliefs about the effects of its product unless those beliefs have been fostered by the advertiser's representations. For example, in Alberty v. FTC, 182 F.2d 36 (D.C.Cir.), cert. denied, 340 U.S. 818 (1950), the Court of Appeals held that in the absence of any evidence that consumers had been misled by advertising for an iron supplement, the Commission could not require the advertiser to disclose that the supplement would not benefit the majority of persons suffering from lassitude. As the Court explained, 182 F.2d at 39:

"We think that neither the purpose nor the terms of the [FTC Act] are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud, a negative restriction It would be ideal from the buyer's point of view if all advertisements were required to describe the product with cold precision, to enumerate with fidelity its shortcomings, and to call attention to the circumstances in which it is valueless But we think that the negative function of preventing falsity and the affirmative function of requiring, or encouraging, additional interesting and perhaps useful information which is not essential to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter When the Commission goes beyond [the prevention of falsity and fraud] and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority." (Emphasis supplied)

The FTC itself reached the same conclusion in ITT Continental Baking Co., 83 F.T.C. 865 (1973). That case involved advertisements that claimed that Hostess snack cakes

offered "good nutrition" because they were enriched with vitamins and minerals. The Staff contended that the "good nutrition" claim was misleading because the advertisement failed to disclose that Hostess snack cakes contain large amounts of sugar. In rejecting the Staff argument, the Commission stated:

"[I]t would be unrealistic to impose upon the advertiser the heavy burden of nutritional education, especially with respect to radio and TV commercials which in many cases are shorter than 30 seconds and seldom as long as 60 seconds In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement." Id. at 965. (Emphasis added.)

Thus, in the absence of affirmative representations that need to be remedied, the FTC cannot legally compel cigarette companies to disclose specific health information in their advertisements. Although the Staff may assert that consumers wish to receive such information, the Commission has no power to obligate advertisers to provide all potentially interesting information regarding their products.

No case brought under Section 5 of which we are aware is contrary to this conclusion. All involve affirmative health, safety, pricing and other claims that were found by the Commission to be likely to deceive a substantial portion of the buying public. For example, in American Medicinal Products, Inc., 32 F.T.C. 1375 (1941), aff'd, 136 F.2d 426 (9th Cir. 1943), the only case cited by the Staff in support

of its contention that there is precedent for requiring specific health warnings relating to cigarette smoking (Report at 4-28, 4-29), the respondents had affirmatively represented that a thyroid extract product, Re-Duce-Oids, was a cure or remedy for obesity and constituted a safe, competent and effective treatment. Some, but not all, of the advertisements contained qualifying language including conditions for which use of Re-Duce-Oids was contraindicated. The Commission found that consumers could not self-diagnose various of the contraindicated conditions, and that the use of a thyroid extract even by normal individuals had to be medically supervised. Consequently, the FTC required that future advertisements contain an expanded list of hazards potentially resulting from use of Re-Duce-Oids, and the disclosure that Re-Duce-Oids should only be used under competent medical supervision.

The facts of that and similar cases are clearly distinguishable from cigarette advertising. In American Medical Products, consumers were urged to buy a product as a cure or treatment for a specific health problem; obviously, such direct and affirmative health representations necessitated adequate disclosure of the health effects of use of the product. Cigarettes, however, are not advertised as health remedies, and no consumer buys cigarettes for the cure or treatment of a health problem. But even if one might, the warning contained in every cigarette advertisement insures that no consumer would be misled and assume that health effects are claimed for cigarettes.

The Report, in fact, does not seriously dispute this point, but instead contends that cigarette advertisements are deceptive because consumers are "uninformed" (rather than misinformed) about the details of the smoking and health question. Report at 4-5. As these Comments have demonstrated, the Staff's premise that consumers are uninformed clearly is invalid. In any event, however, an advertisement cannot be considered deceptive within the meaning of Section 5 if it fails to disclose information about which consumers merely are uninformed; deception may occur only when consumers are misinformed about the effects of the product advertised. That proposition is established by one of the very cases relied upon most heavily by the Staff, Simeon Management Corp. v. FTC, 579 F.2d 1137, 1146 (9th Cir. 1978).

The Staff similarly misstates the law when it implies that cigarette advertising is deceptive because consumers allegedly do not "spontaneously" and "consciously" recall the health warning at the time they make purchase decisions. Report at 4-9. The only relevant question under Section 5 is whether an advertisement is deceptive. See 1964 Cigarette Rule at 8351. Accord, Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944). Compare American Brands, Inc. v. R. J. Reynolds Tobacco Co., 413 F.Supp. 1352, 1356-1357 (S.D.N.Y. 1976); American Home Products Corp. v. Johnson & Johnson, 436 F.Supp. 785 (S.D.N.Y. 1977), aff'd, 577 F.2d 160, 165-166 (2d Cir. 1978); McNeilab, Inc. v. American Home Products

Corp., 501 F.Supp. 517, 524-525 (S.D.N.Y. 1980). We are aware of no case, and the Report cites none, that holds an advertiser responsible for the failure of consumers to retain the message in an advertisement. Indeed, the Consent Orders entered into in 1972 between the FTC and the six major cigarette companies require only clear and conspicuous disclosure of the cigarette warning in advertising; no provision of these orders relates in any way to consumer recall.

In sum, the Staff's contention that consumer ignorance of a fact necessitates the disclosure of that fact in advertising is wholly unsupported by law. The cigarette warning, which sets forth the essence of the entire anti-smoking argument, precludes any finding that cigarette advertisements are deceptive within the meaning of Section 5.

B. The Commission Is Barred By Congressional Policy and By Its Own Previous Actions From Altering the Cigarette Warning

1. The Staff's Proposal To Change the Cigarette Warning Is Contrary to Congressional Policy

In 1970, after an extensive review of the entire smoking and health controversy, including the FTC's role in that controversy, Congress passed the Public Health Cigarette Smoking Act of 1969 (the "Act"), 15 U.S.C. § 1331 et seq., which amended the original Federal Cigarette Labeling and Advertising Act of 1965. Congress sought by the Act "to establish a comprehensive Federal program to deal with cigarette labeling and advertising." 15 U.S.C. § 1331. The

centerpiece of the "comprehensive Federal program" that Congress developed was the warning statement that it required on all cigarette packages. Congress prescribed the text of this warning with great specificity in Section 4 of the Act, 15 U.S.C. § 1333. The Act's legislative history demonstrates that, far from being careless or inadvertent, this wording reflected thorough congressional consideration of the relationship between smoking and health, and full consideration of the proper mechanism for bringing that possible relationship to the attention of consumers. H.R. Rep. No. 289, 91st Cong., 1st Sess. 2-6 (1969); S. Rep. No. 566, 91st Cong., 1st Sess. 1-13 (1969); H.R. Rep. No. 897, 91st Cong., 2d Sess. 4-5 (1970). In reaching its conclusion as to the appropriate warning to be required on cigarette packages, Congress rejected the FTC's proposed warning notice. S. Rep. No. 566, 91st Cong., 1st Sess. 6 (1969).

While Section 7 of the Act (15 U.S.C. § 1336(a)) recognizes the continued jurisdiction of the FTC to regulate cigarette advertising in appropriate circumstances, it is clear that Congress expected the Commission to exercise that authority in a manner consistent with the basic regulatory approach embodied in the Act. In this connection, Section 2 of the Act states that efforts to inform consumers about the alleged hazards of smoking should not be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations . . .," indicating congressional intent to impose

a uniform and consistent national policy in this area. 15 U.S.C. § 1331. Moreover, under Section 8 of the Act, the Commission is required to submit an annual report to Congress on cigarette advertising which includes "such recommendations for legislative action as it may deem appropriate." 15 U.S.C. § 1337. The obvious purpose of this provision is to ensure that Congress: (i) is fully apprised of the contents of cigarette advertising, (ii) has an ample opportunity to determine whether new substantive approaches are needed, and (iii) may exercise its authority to formulate a policy consistent with those needs.

The 1972 Consent Orders, which incorporate in cigarette advertising the precise warning that Congress had already required in cigarette labeling, are not inconsistent with the policy of uniformity embodied in the Act. It is an entirely different matter, however, for the FTC to seek on its own to devise a new warning statement that Congress has neither adopted nor approved. When in 1969 Congress determined that the original warning notice required by the 1965 Act should be changed, it amended the Act. The Act as amended thus represents a congressional determination that the present warning is adequate to inform consumers about the asserted relationship between smoking and health. The Act also represents a determination that conflicting approaches to the regulation of cigarettes are improper and that a comprehensive uniform policy, legislatively formulated and articulated, is most

beneficial to the public. Since that time, Congress consistently has taken an active interest in all matters relating to cigarettes and cigarette advertising, and despite annual overtures by the FTC to do so has shown no dissatisfaction with the present health warning, either in packaging or in advertising. Under these circumstances, for the Commission to seek to make any changes on its own -- whether through adjudication or rulemaking -- would violate this clear policy of Congress.

2. The Staff's Proposed Change in the Cigarette Warning Label Is Contrary To the 1981 Consent Judgments and 1972 Consent Orders Entered Into By the Cigarette Manufacturers

The Staff's principal complaint against present cigarette advertising is that the warning notice prescribed by Congress does not contain sufficient information regarding the alleged health hazards of smoking. Report at 4-17, 4-18, 4-19. But that warning notice is included in all cigarette advertising precisely because the FTC chose in 1972 to resolve its charges that cigarette advertising was deceptive by entering into negotiated consent orders that provide for the inclusion of the warning notice. Lorillard, et al., 80 F.T.C. 455. Moreover, as the Report notes, in 1975 the FTC brought civil penalty actions against the major cigarette manufacturers for alleged violations of the 1972 Consent Orders. Report at 4-5 n.14. In July 1981, two months after the Staff issued its Report, the Commission entered into an overall settlement of

those actions.¹ As part of that settlement, the Commission agreed to the entry of Consent Judgments that interpret and purportedly clarify the 1972 Consent Orders and provide that the original Orders "shall remain in full force and effect."²

Having just months ago expressly reaffirmed the warning notice embodied in the original consent orders, the FTC cannot unilaterally repudiate its agreement and impose new warning notices or other requirements on the manufacturers. Rather it must have adequate grounds to seek a modification of those orders, and no such grounds exist.

In United States v. Swift & Co., 286 U.S. 106, 119 (1932), the Supreme Court established the standard for modifications of judicial consent decrees:

"Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." (Emphasis supplied).

That test is equally applicable to requests for modification by the government, e.g., United States v. Radio Corp. of America, 46 F.Supp. 654, 656 (D.Del. 1942), appeal

¹ The action against R.J. Reynolds Tobacco Co., Inc. remains pending, but only as to whether penalties will be imposed.

² The Consent Judgments also provide that, inter alia: the warning notice will for the first time appear on vending machines, certain additional point-of-sale promotional material, and certain additional non-point-of-sale material; the warning will appear in a single line across the bottom of billboards in considerably larger lettering; and the warning will be disclosed in the same foreign language as is used in any foreign language advertisement.

dismissed, 318 U.S. 796 (1943), and to modifications of Commission orders. Phillips Petroleum Co., [1970-73 Transfer Binder] Trade Reg. Rep. ¶ 19,546 (1971).¹ In United States v. Radio Corp. of America, *supra*, the government sought to vacate an antitrust consent decree for the reason that the Department of Justice felt the decree no longer was adequate to promote the public interest, just as the Staff claims in this case. The court denied the government's motion, holding:

Since these consent decrees are based upon an agreement made by the Attorney General which is binding upon the Government, the defendants are entitled to set them up as a bar to any attempt by the Government to relitigate the issues raised in the suit or to seek relief with respect thereto additional to that given by the consent decrees. 46 F. Supp. at 656.

The Report has not and clearly could not provide a basis for satisfying the Swift standard. All of the "new" information that the Staff claims to have acquired about the relationship between smoking and health and about consumer knowledge of those claims was in its possession long before the civil penalty cases were settled. Indeed, the Staff could

¹ See also, Elmo Division of Drive-X Co. v. Dixon, 348 F.2d 342, 346 (D.C. Cir. 1965). In that case the Commission had issued a complaint dealing with substantially the same matters covered by an earlier consent order. In overturning the complaint, the Court of Appeals held that the Commission "may not unilaterally obliterate a part of the consideration -- indeed an important part -- by which it secured appellant's assent to be bound by a cease and desist order." An important element of the consideration by which the tobacco companies' consent to the 1972 order was obtained was relief from the "time and resources which would have been expended in litigation." See Agreement Containing Consent Order to Cease and Desist at 2.

not even justify modification of its 1972 Consent Orders. As noted above, the "new" medical information cited by the Staff is largely cumulative of allegations against the safety of cigarettes that were made by the Commission in 1972.

C. The Staff's Proposals Are Inconsistent With the First Amendment

The Staff asserts that the specific affirmative disclosures it proposes for all future cigarette advertising to "remedy" current "deceptions" are consistent with the First Amendment. Report at 5-42 to 5-46. However, the principle that the FTC may take any action "reasonably related" to the prevention of the practice alleged to be illegal, see Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946), has been superseded in advertising cases by the First Amendment's requirement that regulation of protected speech may go no further than necessary to advance a substantial governmental interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). The Staff's contention that the affirmative disclosures it seeks are consistent with the First Amendment solely because they would increase the amount of information available to consumers thus is incorrect.

Since 1976, it has been clear that the First Amendment protects "commercial speech," i.e., speech which "does no more than propose a commercial transaction." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 784, 762 (1976). The Supreme Court recently articulated

the degree to which commercial speech may be regulated, consistent with the First Amendment, in Central Hudson Gas & Electric Corp. v. Public Service Commission, supra. The Court traced the prior commercial speech cases and noted that "we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech." 447 U.S. at 564. The Court then determined that commercial speech may be regulated only if the regulation directly advances a substantial state interest and is no more extensive than is necessary to serve that state interest. Id. at 566.¹ The Court stressed that the remedy "must be designed carefully to achieve the state's goal"; "may not be sustained if it provides only ineffective or remote support for the government's purpose"; and may not be "excessive." Id. at 564. The Staff's proposed remedies cannot meet this test.

¹ The lower courts had already adopted these First Amendment principles in Section 5 cases prior to Central Hudson. E.g., Beneficial Corp. v. FTC, 542 F.2d 611, 620 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977) (striking down FTC ban on use of the phrase "Instant Tax Refund" as excessively broad, and noting that "a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of the deception"); National Commission on Egg Nutrition, supra, 570 F.2d at 164 (Court of Appeals rejected the FTC's required disclosure because it was broader than absolutely necessary to inform the public that a controversy existed among experts regarding the effect of eggs on health).

V. THE STAFF'S PROPOSED REMEDIES

A. The Report Mischaracterizes Industry Self-Regulation of Advertising Practices

In the course of reaching its conclusion about the best potential remedies, the Staff considers and rejects, out-of-hand, voluntary industry action. Report at 5-10 through 5-16. As with the rest of the Report, the discussion of industry action on advertising and the smoking and health issue is misguided. The Staff's position apparently is that the industry has been remiss because it has not fully agreed with the Staff's position on smoking and health.

Any objective review of past industry action with respect to advertising reveals that the tobacco industry has been and will continue to be fully responsive to legitimate concerns.

Since the Surgeon General's initial Report on Smoking and Health was issued in 1964, the tobacco industry has taken a number of significant steps to modify its advertising and promotional practices, especially to avoid influence on teenagers. It has eliminated advertising in student publications and the distribution of cigarette samples on campuses or near schools. It has eliminated the use of testimonials by athletes and public figures in cigarette advertising, and has required that all models used in cigarette advertising be, and appear to be, 25 or older. It supported the ban on broadcast advertising of cigarettes.

When, in 1959, the FTC decided that "all representations of low or reduced tar or nicotine, whether by filtration or otherwise, will be construed as health claims," the industry voluntarily agreed to eliminate all references to "tar" and nicotine from cigarette advertising. A few years later, when the Commission reversed its position, the industry acceded to its request that cigarette advertising disclose "tar" and nicotine content. In 1972 the members of the industry agreed to the consent orders requiring the health warning in all cigarette advertising.¹

The industry to date has committed more than \$91 million, on a no-strings-attached basis, to fund independent scientific and medical research on smoking and health questions. While its views on smoking-and-health questions differ from those of the FTC Staff, it does not use the commercial advertising of cigarettes to argue those views or to discredit the Surgeon General's conclusions.

The industry will continue to maintain a responsible advertising policy. It will not, however, submit to each annual flight of fancy by the FTC Staff.

¹ The Staff has suggested that the Commission in 1972 concluded that cigarette advertising that lacked a health warning was deceptive when such was not the case. No hearings were held on the Staff assertions of deception, no findings on the issue were made, and the Staff's questionable legal theory that advertising could be found deceptive for failure to disclose information of common public knowledge was never put to the test.

B. The Staff Has Failed To Demonstrate That the Proposed Rotational Warning System Is Likely To Be More Effective Than the Current Warning

The Staff's proposal for rotational warnings is based on its finding that the current warning is "ineffective," but as has been demonstrated above, that finding is wrong. In evaluating the effectiveness of warning information contained in cigarette advertising, one must consider that such information reaches only a portion of the population. Cigarette advertising is excluded altogether from the broadcast media, the most influential media and the primary source of news and information for a large portion of the public, most particularly for teenagers. Nonsmokers, who constitute two-thirds of the population, cannot generally be expected to examine closely or be influenced by cigarette advertising. Furthermore, substantial numbers of people, smokers and nonsmokers alike, do not regularly read newspapers or magazines and therefore are not regularly exposed to cigarette advertising. Even among those who are exposed to cigarette advertising in the print media, only a limited number pay close attention to, or remember, its content. Still others who do read the advertising will not be sufficiently influenced by the warning to change their views and attitudes in any event.

Yet, as has been seen, despite those inherent limitations, the cigarette warning label has been remarkably effective in promoting consumer awareness of the smoking and health issue.

The Staff also errs in its simplistic contention that the present warning label has become ineffective because of "wearout" and that new warnings are needed if they are to be noticed by the consuming public. The fact that an advertising message is no longer specifically mentioned on unaided recall by a consumer who has seen the message repeatedly does not mean that that consumer is unaware of the message; in fact, as has been shown, there is virtually universal awareness of the cigarette warning. And with respect to consumers who are entering the market for the first time, the current cigarette warning is as novel as any other.

The Staff made no effort to determine whether the warnings it is now proposing are likely to be more effective than the warning the FTC proposed a decade ago, which the Staff now finds to be deficient. Indeed, so far as the Staff's primary proposal is concerned, which involves an elaborate scheme of rotational warnings, the Staff's evidence of likely impact is limited to "some preliminary research" of Sweden's rotational warning system.

The evidence the Staff has been able to marshal in support of rotational warnings is, to say the least, meager and inconclusive. The Staff admits as much when it concedes that, despite the "preliminary" research results to which it referred (and which are not specifically disclosed or otherwise discussed in the Report), "the Swedish [rotational] system's long-term impact cannot yet be measured. . . ." Report at

5-33. The Staff also apparently feels compelled to state that "there are a number of differences between the U.S. and Sweden that make it impossible to state whether their experience with rotational warnings would be comparable to ours." Ibid.

Despite these concessions, the Staff concludes that Sweden's brief experience with rotational warnings "[n]evertheless . . . is instructive." Ibid. This remarkable conclusion, with its singular lack of basis, reveals at once the extent to which the Staff is prepared to bend existing evidence to satisfy its preordained objectives as well as the true nature of those objectives -- not to inform the public but to force or convince smokers to stop smoking.